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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 89

AUTOMOBILE CLUB OF MICHIGAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 177a–204a[1]) is reported at 20 T. C. 1033. The opinion of the Court of Appeals (Pet. 4a–34a) is reported at 230 F. 2d 585.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1956. (Pet. 35a.) The petition for a writ of certiorari was filed on May 15, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

[1] References to R. pages 1a–206a are to the record appendix to taxpayer's brief in the court below; references to R. 1b–9b are to the record appendix to the Commissioner's brief in the court below.

QUESTIONS PRESENTED

1. Whether the amount of membership dues paid to taxpayer during the taxable years should be accrued as income for the respective years in which received.

2. When in July, 1945, the Commissioner correctly held that taxpayer was not exempt from income taxes as a social club within the meaning of Section 101 (9) of the Internal Revenue Code of 1939, was he estopped by erroneous prior rulings, that taxpayer was exempt under corresponding sections of the Revenue Acts of 1932 and 1936, from requiring payment of taxes for 1943 and 1944?

3. Whether the statute of limitations barred assessment of deficiencies for 1943 and 1944.

STATUTE AND REGULATIONS INVOLVED

Sections 41, 42 (a), 52 (a), 54 (a), (b), and (f), 101 (9), 275 (a), 276 (a) and (b), and 3791 (b) of the Internal Revenue Code of 1939,[2] and Sections 29.52–1, 29.101–1, 29.101–2 (a), (c), (e), (g), (i), and (j) and 29.101 (9)–1 of Treasury Regulations 111, are set forth in the Appendix, *infra*, pp. 18–28.

STATEMENT

Taxpayer, a nonprofit corporation without capital stock or shares, seeks review by this Court of three of the four disparate issues decided by the courts below. For convenience, these issues are discussed here in the order in which the petition raises them,

[2] Unless otherwise noted, references to the "Code" or the "Internal Revenue Code" will be to the Internal Revenue Code of 1939.

although this departs in stress and in sequence from their treatment in the lower courts. The Tax Court's opinion rendered *en banc* was unanimous (R. 204a); in the Court of Appeals dissent was expressed only with reference to the question here numbered "2" (p. 2, *supra;* Pet. 15a).

1. Taxpayer's returns for each of the taxable years 1943 through 1947 were prepared on the calendar year basis and on the accrual method of accounting. (R. 194a.) Its dues were payable annually in advance. (R. 180a, 194a.) Dues collected were not segregated from its general funds, but were deposited by taxpayer in the general bank account in which all of its other receipts were deposited. (R. 193a.)

On its books taxpayer credited the dues to an account carried as a liability account, designated "Unearned Membership Dues." During the first month of membership and each following month 1/12 of the amount paid was credited to an income account designated "Membership Income." In its returns for 1943 through 1947 taxpayer reported income from membership dues under this method. On the other hand, the Commissioner determined that the actual amount of membership dues paid to taxpayer should be reported as income for the year in which received. (R. 194a.) Both courts below unanimously sustained the Commissioner on this issue. (R. 195a–196a; Pet. 14a–15a.)

2. On June 11, 1934, the Commissioner wrote taxpayer that on the basis of evidence submitted taxpayer was entitled to exemption from income taxation under the provisions of Section 101(9) of the Reve-

nue Act of 1932, that, therefore, it was not required to file returns for 1933, and that under the provisions of corresponding sections of prior Revenue Acts and of the Revenue Act of 1934 it would not be required to file returns so long as there was no change in its organization, its purposes or methods of doing business. On July 5, 1938, a similar ruling was made by the Commissioner on taxpayer's claim for exemption under Section 101(9) of the Revenue Act of 1936. (Pet. 6a.)

In May, 1945, the Commissioner wrote taxpayer that the Bureau of Internal Revenue was reconsidering the question of exemption of automobile associations in the light of G. C. M. 23688, 1943 Cum. Bull. 283. (Pet. 6a.) Taxpayer having furnishing certain further information, the Commissioner on July 16, 1945, again wrote taxpayer and called attention to the fact that Section 101(9) of the Internal Revenue Code provides for the exemption of (R. 6a–7a)—

> Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.

The Commissioner's letter continued as follows (Pet. 7a):

> This office holds that the term "club" as used in the above section of law contemplates commingling of members, one with the other in fellowship. Thus, an organization should be so composed and its activities be such that fellowship among the members plays a material part in the life of the organization in or-

der for it to come within the meaning of the term "club."

The evidence submitted shows that fellowship does not constitute a material part of the life of your organization and that your principal activity is the rendering of commercial services to your members.

It is, accordingly, held that you are not a club "organized and operated exclusively for pleasure, recreation and other nonprofitable purposes," within the meaning of section 101 (9) of the Internal Revenue Code or the corresponding sections of prior revenue acts, and, therefore, are not entitled to exemption under those sections. Furthermore, there is no other provision of law under which an organization of your character can be held to be exempt from Federal income tax.

Bureau rulings of June 11, 1934 and July 5, 1938 are hereby revoked.

In view of all the facts and circumstances in your case it is held, with the approval of the Secretary of the Treasury, that you will not be required to file income tax returns for years beginning prior to January 1, 1943. You are, however, required to file returns for the year 1943 and subsequent years.

In compliance taxpayer filed income and excess profits tax returns for the calendar years 1943 and 1944 under protest, on the ground that it was exempt. At the Tax Court hearing, however, taxpayer admitted that it was taxable for the period subsequent to July 16, 1945. (Pet. 8a.) Taxpayer urges, nevertheless, that the Commissioner erred in determining

a deficiency for any period prior to 1945, on the ground that he was estopped from retroactively revoking the prior determinations of a predecessor Commissioner. On this issue both courts sustained the Commissioner (R. 185a–189a; Pet. 8a–13a), Judge McAllister dissenting in the court below (Pet. 15a–34a).

3. The taxpayer did not file its 1943 and 1944 returns until October 22, 1945; it had been directed on July 16, 1945, to file them at the time the rulings of exemption were revoked. The parties on August 25, 1948, executed consents that the income and excess profits taxes could be assessed on or before June 30, 1949, and on May 23, 1949, executed similar consents extending the time for assessment to June 30, 1950. The notice of deficiency was mailed to taxpayer on February 20, 1950. (Pet. 13a.) Taxpayer contends that the three-year statute of limitations bars assessment of the deficiencies, asserting that the period for the two years involved commenced to run from March 15, 1944, and March 15, 1945, respectively. The Commissioner contends that the three-year statute began to run from the date the return was filed, namely, October 2, 1945. If this date controls the assessment is not barred. Taxpayer also contends that the dates on which it filed Form 990,[3] namely, August 12, 1944, and May 17, 1945, started the running of the statute. Both courts unanimously sustained the Commissioner, holding that the statute started to run from October 22, 1945, and that the

[3] Returns on Form 990 are information returns required of certain exempt corporations under Section 54 (f) of the Internal Revenue Code (Appendix, *infra*, pp. 19–20) and Treasury Regulations 111, Section 29.101–2 (Appendix, *infra*, p. 26).

information returns made upon Form 990 did not constitute the returns contemplated by Section 275 (a) to start the running of the limitations period. (Pet. 13a–14a; R. 189a–190a, 192a.)

ARGUMENT

1. The Tax Court and the court below were clearly correct in determining that membership dues paid in advance to taxpayer should be included in income in the year in which taxpayer received them. (R. 195a–196a; Pet. 14a–15a.) This money was received by taxpayer under a claim of right for its own use and deposited in its general bank account, subject to no restriction of any kind. (R. 193a.) Hence, the circumstance that the services which taxpayer obligated itself to render in return for the dues might be furnished in some cases in a succeeding taxable year in no way derogated from their character as income in the year of receipt. The statute nowhere limits taxable income to earned income. Income often does not represent a net figure and must be returned by a taxpayer, whether on the cash or the accrual basis, even though expenditures necessarily paid or incurred in consideration for its receipt may not be deducted until a future year. Internal Revenue Code, Sections 41 and 42 (a) (Appendix, *infra*, p. 18). This rule is settled by repeated decisions of this Court.[4] The lower court decisions sustaining the doctrine are

[4] *North American Oil* v. *Burnet*, 286 U. S. 417, 424; *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 363, 365; *Brown* v. *Helvering*, 291 U. S. 193; *Security Mills Co.* v. *Commissioner*, 321 U. S. 281; *United States* v. *Lewis*, 340 U. S. 590; *Healy* v. *Commissioner*, 345 U. S. 278.

The decisions make it clear that the rule applies to accrual as

legion and are by no means limited to cases where the right to income was in dispute." (Pet. 9.)

Taxpayer asserts, however, that the decision below is in conflict with the decision of the Court of Appeals

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well as cash basis taxpayers. See *North American Oil* v. *Burnet*, *supra*, at 421–22, 423–24; *id.*, 50 F. 2d 752, 755–56 (C. A. 9th); *Brown* v. *Helvering*, *supra*, at 199–200; *Clay Sewer Pipe Assn.* v. *Commissioner*, 139 F. 2d 130, 132 (C. A. 3d); *South Dade Farms* v. *Commissioner*, 138 F. 2d 818 (C. A. 5th).

" For example, *Blum* v. *Helvering*, 74 F. 2d 482 (C. A. D. C.), certiorari denied, 295 U. S. 732 (profits realized from stock sales, subject to the obligation to support market with a fund in a stated minimum amount by operating a trading pool for six months subsequent); *Fairmount Creamery Corp.* v. *Helvering*, 89 F. 2d 810 (C. A. D. C.) (interest received by corporation from employees to whom stock had been sold on credit, subject to refund in the event employee quit or was discharged); *Commissioner* v. *Lyon*, 97 F. 2d 70, 73–74 (C. A. 9th) (cash paid to lessor at beginning of ten-year term, subject to refund on termination of lease otherwise than by default of lessee); *First Nat. Bank* v. *Commissioner*, 107 F. 2d 141 (C. A. 6th) (proceeds of a note held taxable, notwithstanding contingent liability to repay at maturity if maker failed or if purchase of certain corporate assets was not consummated); *Detroit Consolidated Theatres* v. *Commissioner*, 133 F. 2d 200 (C. A. 6th) (sum received as advance rental deposit); *South Dade Farms* v. *Commissioner*, 138 F. 2d 818 (C. A. 5th) (sum received as advance rentals); *Clay Sewer Pipe Assn.* v. *Commissioner*, 139 F. 2d 130 (C. A. 3d) (prepayment for services to be rendered, although under contract recipient might be liable subsequently to return their equivalent); *DeGuire* v. *Higgins*, 159 F. 2d 921 (C. A. 2d) (dividends payable to purchaser of stock subject to possible refund under contract terms; *Capital Warehouse Co.* v. *Commissioner*, 171 F. 2d 395 (C. A. 8th) (prepayment for services whose cost taxpayer must defray in later year); *Haberkorn* v. *United States*, 173 F. 2d 587 (C. A. 6th) (bonus subsequently returned to employer because of error in calculation of profits, upon which the bonus was based); *Gilken Corp.* v. *Commissioner*, 176 F. 2d 141, 144–145 (sums received as advance rental deposit, security for performance and part payment of purchase price

for the Tenth Circuit in *Beacon Publishing Co.* v. *Commissioner*, 218 F. 2d 697 (Pet. 8–11), rendered by a divided court (Judge Bratton dissenting) subsequent to the decision of the Tax Court in the instant case.[5] While we respectfully submit that the majority opinion in the *Beacon Publishing Co.* case is incorrect, it is our view that this decision is nevertheless not in direct conflict with the decision of the court below. In the *Beacon Publishing Co.* case prepaid sums were received by taxpayer as payment for newspapers to be delivered in future years, while here the prepaid sums were received as payment for services. And there was present in the *Beacon Publishing Co.* case an administrative ruling which lent possible support to taxpayer's reasoning there. In I. T. 3369, 1940–1 Cum. Bull. 46, the Internal Revenue Service, recognizing that there were two methods by which accrual basis publishers had been accounting for prepaid subscriptions, had ruled that where a publisher "over a period of years" had reported an aliquot part of the subscription income over the subscription period, it would be permitted to continue to report the income in that manner and would not be required to change this accounting practice, pro-

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should lessee exercise its option to purchase); *Booth Newspapers* v. *Commissioner*, 201 F. 2d 55 (C. A. 6th) (sum received by cash basis taxpayer as prepaid subscription for newspapers to be delivered in succeeding year); *Gordon's Estate* v. *Commissioner*, 201 F. 2d 171 (C. A. 6th) (sum received under lease with privilege to purchase); *Hyde Park Realty* v. *Commissioner*, 211 F. 2d 462 (C. A. 2d) (sum received as advance rentals).

[5] In a later case the Tax Court has expressed agreement with the dissenting opinion in the *Beacon Publishing Co.* case. *Andrews* v. *Commissioner*, 23 T. C. 1026, 1033.

vided that expenses applicable to obtaining the subscriptions were similarly allocated in the subscription period. Publishers who had been reporting the subscription income when received (see G. C. M. 20021, 1938–1 Cum. Bull. 157) were to continue to report the income in that manner.' By contrast no administrative authority in support of taxpayer's position here may be claimed.

Moreover, the question which taxpayer seeks to raise does not seem appropriate now for decision by this Court. The Internal Revenue Code of 1954, as originally passed, contained in Section 452 detailed provisions authorizing deferral of income of accrual basis taxpayers to future years in certain cases of prepayment for services, goods or the use of property. Section 462 of the 1954 Code made correlative provision for permitting reserves to be set up in the taxable year for estimated future expenses. However, experience demonstrated that these sections would entail a much greater loss of revenue than originally estimated, and both were repealed. Section 1, Act of June 15, 1955, c. 143, 69 Stat. 134. Nevertheless, the committees of both Houses indicated that the subject was to be studied further with a view to legislation at an early date.' The Senate com-

'H. Rep. No. 293, 84th Cong., 1st Sess., p. 4 (1955–2 Cum. Bull. 852, 854) stated:

"In view of the testimony received from taxpayers by your committee and the recognized desirability of conforming tax accounting to business accounting, your committee has instructed the staff of the Treasury Department and the staff of the Joint Committee on Internal Revenue Taxation to make studies of these accounting problems in an effort to provide conformance

mittee particularly referred to the uncertainty existing in the field of prepaid subscription income. S. Rep. No. 372, 84th Cong., 1st Sess., p. 5 (1955–2 Cum. Bull. 858, 861). However, while uncertainty may exist with respect to the status of prepaid subscription income, it is not present in the case of prepaid

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of tax and business accounting without the transitional revenue loss. It has further requested each staff to report any suggested solutions to the committee as soon as feasible."

The Secretary of the Treasury wrote the Chairman of the Committee on Ways and Means as follows (H. Rep. 293, *supra*, p. 5 (1955–2 Cum. Bull. 852, 855)):

"Furthermore, the Treasury Department will not consider the repeal of section 452 as any indication of congressional intent as to the proper treatment of prepaid subscriptions and other items of prepaid income, either under prior law or under other provisions of the 1954 code. In other words, the repeal of section 452 will not be considered by the Department as either the acceptance or the rejection by Congress of the decision in *Beacon Publishing Co.* v. *Commissioner* (218 F. (2d) 697, C. A. 10, 1955) or any other judicial decisions."

S. Rep. No. 372, 84th Cong., 1st Sess., p. 6 (1955–2 Cum Bull. 858, 861) declared:

"Your committee desires to make its position clear that it expects to report out legislation dealing with prepaid income and reserves for estimated expenses at an early date. As indicated above, the existing rulings of the Treasury Department and the court decisions dealing with estimated expenses and prepaid income are now in such a state of confusion and uncertainty that in the opinion of your committee legislative action is required on these subjects. In addition, your committee believes that it is essential that the income tax laws be brought into harmony with generally accepted accounting principles. Moreover, your committee believes that the present status, where some taxpayers are able to defer prepaid income while others are not, is inequitable and should not be allowed to continue. In order to eliminate this uncertainty and discrimination, definite rules must be written into the income tax law. For these reasons your committee plans to begin studies in the near future to devise proper substitutes for the sections now being repealed."

membership dues, which fall within the general rule well settled by many decisions of this Court and of the lower courts. In the circumstances, and particularly in view of the Congressional recognition of a need for further study as a basis for anticipated legislation, it is believed that review of the question involved in the instant case is not warranted.[8]

Contrary to taxpayer's further contention (Pet. 8, 9–11) the decision of the Fifth Circuit in *Schuessler* v. *Commissioner*, 230 F. 2d 722, is not in direct conflict with the decision of the court below. There, an accrual basis taxpayer was permitted a deduction of an item representing a reserve for the estimated cost of carrying out a guarantee to turn on and off each year for five years furnaces sold in the taxable year. The income from the sales against which the guarantee was made was all reported in the taxable year. Thus, unlike the present case, the cited case does not represent a claim for deferring or spreading income received under claim of right over future years, but rather whether an asserted liability had actually been incurred in the taxable year or, on the other hand, was unsettled in amount and contingent in obligation and so not deductible until or unless incurred in the future.[9] While problems with respect to deferral of

[8] It may be noted that a bill treating this problem, H. R. 10833, 84th Cong., 2d Sess., was introduced by Mr. Simpson of Pennsylvania, a member of the Committee on Ways and Means, on April 26, 1956.

[9] Compare *E. H. Sheldon & Co.* v. *Commissioner*, 214 F. 2d 655, 656–657 (C. A. 6th); *S. Loewenstein & Son* v. *Commissioner*, 222 F. 2d 919 (C. A. 6th); and *Spencer, White & Prentis* v. *Commissioner*, 144 F. 2d 45 (C. A. 2d), certiorari denied, 323 U. S. 780, with *Pacific Grape Prod. Co.* v. *Commissioner*, 219 F. 2d 862 (C. A. 9th).

prepaid income and deduction of estimated future expenses are related, and although in our view the reasoning and decision of the Fifth Circuit in the *Schuessler* case are incorrect (compare the contrary position of the Tax Court, 24 T. C. 247), the fact remains that there is not a direct conflict with the decision of the court below, for the cases involve different issues.

2. The Tax Court and the majority below correctly held that the Commissioner is not bound by his own or his predecessor's prior mistakes of law. (R. 185a–189a; Pet. 8a–13a.) The petition does not dispute the correctness of the Commissioner's ruling contained in his letter of July 16, 1945, that taxpayer was not exempt from tax under Section 101 (9) of the Internal Revenue Code (Appendix, *infra*, p. 20). (Pet. 6a.) At the Tax Court hearing taxpayer expressly admitted it was taxable for the period subsequent to July 16, 1945. (R. 148a; Pet. 8a.) And indeed the authorities compelled this concession.[10] In exempting "clubs" under Section 101 (9) Congress referred to organizations whose members commingled in fellowship; in limiting the exemption to clubs organized and operated exclusively "for pleasure, recreation and other nonprofitable purposes," Congress meant nonprofitable purposes similar to purposes of pleasure or recreation. Taxpayer, which per-

[10] *Smyth* v. *California State Automobile Assn.*, 175 F. 2d 752 (C. A. 9th), certiorari denied, 338 U. S. 905; *Keystone Automobile Club* v. *Commissioner*, 181 F. 2d 402 (C. A. 3rd); *Chattanooga Auto. Club* v. *Commissioner*, 182 F. 2d 551 (C. A. 6th); *Automobile Club of St. Paul* v. *Commissioner*, 12 T. C. 1152; G. C. M. 23688, 1943 Cum. Bull. 283.

forms commercial services for its members, plainly falls outside the exempted class. (Pet. 7a–8a, 11a.).

The retroactive ruling of the Commissioner directing that tax returns be filed for 1943 and 1944 was authorized under Section 3791 (b) of the Code. (Appendix, *infra*, p. 21.) With respect to a predecessor of Section 3791 (b) under an earlier Revenue Act,[11] this Court held in *Helvering* v. *Reynolds*, 306 U. S. 110, 116, that it is clear Congress intended to give the Treasury power to correct misinterpretations "and thereby to affect cases in which the taxpayer's liability had not been finally determined, unless, in the judgment of the Treasury, some good reason required that such alterations operate only prospectively."[12]

Surely, the Commissioner was not arbitrary in his exercise of the discretion conferred under Section 3791 (b) when, with the approval of the Secretary of the Treasury, he made his ruling of July 16, 1945, retroactive for only two of the twelve years between 1934 and 1945.[13] Moreover, taxpayer does not assert

[11] Revenue Act of 1928, c. 852, 45 Stat. 791, Section 605.

[12] The 1928 Act dealt only with retroactive Regulations, but subsequent legislation, carried over into the Code, broadened the Commissioner's authority under this provision to include internal revenue rulings as well. Revenue Act of 1934, c. 277, 48 Stat. 680, Section 506. See also the committee reports which recommended this enactment. H. Rep. No. 704, 73d Cong., 2d Sess., p. 38 (1939–1 Cum. Bull. (Part 2) 554, 583); S. Rep. No. 558, 73d Cong., 2d Sess., p. 48 (1939–1 Cum. Bull. (Part 2) 586, 623).

[13] G. C. M. 23688, referred to in the Commissioner's letters of May 12, 1945 (R. 83a–84a), and July 16, 1945, was published in the Internal Revenue Bulletin of July 11, 1943, as well as in the Cumulative Bulletin for 1943. It is not disputed that the M association which was the taxpayer involved in the cited ruling is

that it has altered its position to its detriment in reliance on the Commissioner's former ruling (Pet. 8a); nor does it show any prejudice resulting from the Commissioner's rulings as to 1943 and 1944, except the liability to pay taxes, which Congress required of every other taxpayer. A taxpayer has no vested interest in a mistaken construction of the statute by the Commissioner. And the Commissioner lacks authority to grant an exemption which Congress has not authorized.

3. The courts below were also correct in holding that the three-year statute of limitations [14] on assessment began to run from the date that the returns

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the American Automobile Association. Taxpayer was a member of the American Automobile Association to which it paid dues for 1943 and 1944 in excess of $50,000 and for 1945, 1946 and 1947 in excess of $60,000 (Schedule K of Exs. 13, 15, 17, 19 and 20, R. 2b, 3b, 5b, 7b and 9b), and was represented on its board of directors. G. C. M. 23688 not only specifically set forth the grounds for correct interpretation of Section 101 (9), but also afforded clear evidence that its holding governed individual automobile clubs, such as taxpayer, for it recommended revocation of published exemption rulings of individual clubs. 1943 Cum. Bull. 288. The Tax Court found that so far as appears from any case mentioned by taxpayer the Commissioner has made all revocations of his ruling of exemption with respect to automobile clubs effective in 1943. (R. 189a.) It will not be disputed that there were many such clubs and necessarily some period of time elapsed after the issuance of G. C. M. 23688 before the Commissioner could reconsider the exemption in the case of any particular club. Taxpayer's quotation (Pet. 15) from Rev. Rul. 54–164, 1954–1 Cum. Bull. 88, 92, omits the following:

"A revocation may be effected by a notice to the organization or by a ruling or other statement published in the Internal Revenue Bulletin applicable to the type of organization involved."

[14] Internal Revenue Code Section 275 (a) (Appendix, *infra*, pp. 20–21).

were filed, namely October 22, 1945. (R. 190a–192a; Pet. 13a–14a.) Taxpayer's assertion (Pet. 18–19) that the returns were due in March, 1944, and March, 1945, and that the statute runs from these dates is answered by the provision of Section 276 (a) (Appendix, *infra*, p. 21) that in case "of a failure to file a return the tax may be assessed * * * at any time."

In an effort to avoid the consequences of Section 276 (a), the taxpayer mistakenly asserts that the running of the statute started from the March dates because, it is said, the Commissioner was to blame for the failure to file returns when due. (Pet. 19.) From and after July 16, 1945, when the Commissioner expressly required taxpayer to file returns, taxpayer was under an obligation to file. Its subsequent delay in filing for more than three months was not induced by the Commissioner. Nor was taxpayer's voluntary agreement twice to extend the time for assessment of tax induced by the Commissioner. (Pet. 14a).

The decisions of the Second Circuit in *Balkan Nat. Ins. Co.* v. *Commissioner*, 101 F. 2d 75, and of the Court of Appeals for the District of Columbia in *Stockstrom* v. *Commissioner*, 190 F. 2d 282, are plainly distinguishable on their facts and do not conflict with the decision below. In the *Balkan* case taxpayer's failure to file a return was due to an impossibility created by the Government when the Alien Property Custodian seized all of taxpayer's records and denied access to them. There, the deficiency notice for 1918 income was not mailed to taxpayer in Bulgaria until 1934. In the *Stockstrom* case, where

gifts for 1938 were involved and the notice of deficiency was not sent until 1948, the court held that, although no return had been filed, the purpose of the filing requirement had been fulfilled, since in 1941 the Government had come into possession of all the pertinent facts and the limitation period commenced to run as of that date.

The filing of the annual information returns (Form 990) required from certain exempt organizations did not commence the running of the limitation period. As held by both courts below, these returns did not contain the data necessary to enable the Commissioner to compute taxpayer's liability, and so could not serve to start the limitations period. (R. 192a; Pet. 14a.) *Commissioner* v. *Lane Wells Co.*, 321 U. S. 219; *John Danz Charitable Tr.* v. *Commissioner*, 231 F. 2d 673 (C. A. 9th), pending on petition for certiorari, No. 145, this term.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

* * * * * *

(26 U. S. C. 1952 ed., Sec. 41.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) [As amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687] *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

* * * * * *

(26 U. S. C. 1952 ed., Sec. 42.)

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this chapter shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer, assistant treasurer, or chief accounting officer.

* * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 52.)

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

(*b*) *To Determine Liability to Tax.*—Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records, as the Commissioner deems sufficient to show whether or not such person is liable to tax under this chapter.

* * * * *

(f) [As added by Sec. 117 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] Every or-

ganization, except as hereinafter provided, exempt from taxation under section 101 shall file an annual return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 54.)

SEC. 101. EXEMPTIONS FROM TAX ON CORPORATIONS.

The following organizations shall be exempt from taxation under this chapter—

* * * * *

(9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder;

* * * * *

(26 U. S. C. 1952 ed., Sec. 101.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed

within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(26 U. S. C. 1952 ed., Sec. 275.)

SEC. 276. SAME—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(b) *Waiver.*—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

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(26 U.S.C. 1952 ed., Sec. 276.)

SEC. 3791. RULES AND REGULATIONS.

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(b) *Retroactivity of Regulations or Rulings.*—The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect.

(26 U.S.C. 1952 ed., Sec. 3791.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.52–1. *Corporation Returns.*—Every corporation not expressly exempt from tax must make a return of income, regardless of the amount of its net income. In the case of ordinary corporations, the return shall be on Form 1120. * * *

Sec. 29.101–1 [As amended by T. D. 5381, 1944 Cum. bull. 188, 189] *Proof of Exemption Prior to January 1, 1943.—Annual Returns for Accounting Periods Beginning Prior to January 1, 1943.*—A corporation is not exempt merely because it is not organized and operated for profit. In order to establish its exemption it is necessary that every organization claiming exemption file with the collector for the district in which is located the principal place of business or principal office of the organization an affidavit or a questionnaire as set forth below. An organization claiming exemption under section 101 (1), (3), (4), except a bona fide credit union, (6), (7), (8), (9), (10), (12), (14), or (16) shall file the form of questionnaire appropriate to its activities, filled out in accordance with the instructions on the form or issued therewith. Copies of the following questionnaire forms may be obtained from any collector: For corporations claiming exemption * * * under section 101 (9), Form 1025 * * *. To each such affidavit or questionnaire shall be attached a copy of the articles of incorporation, declaration of trust, or other instrument of similar import, setting forth the permitted powers or activities of the organization, the by-laws or other code of regulations,

and the latest financial statement showing the assets, liabilities, receipts, and disbursements of the organization. An organization claiming exemption under section 101 (5), (6), except organizations organized and operated exclusively for religious purposes, (7), (8), (9), or (14) shall also file with the other information specified herein a return of information on Form 990 relative to the business of the organization for the last complete year of operation * * *.

* * * * *

The collector, upon receipt of the affidavit or questionnaire, and other papers, will examine them as to completeness and will forward completed documents to the Commissioner for decision as to whether the organization is exempt. In addition to the information specified herein, the Commissioner may require any additional information deemed necessary for a proper determination of whether a particular organization is exempt under section 101, and when deemed advisable in the interest of an efficient administration of the internal revenue laws he may in the cases of particular types of organizations provide additional questionnaires or otherwise prescribe the form in which the proof of exemption shall be furnished.

When an organization (other than a mutual insurance company) has established its right to exemption, it need not thereafter make a return of income or any further showing with respect to its status under the law, unless it changes the character of its organization or operations, or the purpose for which it was originally created, except that every organiza-

tion exempt or claiming exemption under section 101 (5), (6), except organizations organized and operated exclusively for religious purposes, (7), (8), (9), or (14) shall file annually returns of information on Form 990 with the collector for the district in which is located the principal place of business or principal office of the organization * * *.

Collectors will keep a list of all organizations held to be exempt to the end that they may occasionally inquire into their status and ascertain whether or not they are observing the conditions upon which their exemption is predicated.

An organization which is exempt, under section 101 and the regulations thereunder, from filing returns of income is not, however, relieved from the duty of filing returns of information (see sections 147 and 148).

Sec. 29.101–2 [As added by T. D. 5381, *supra*]. *Proof of Exemption on or after January 1, 1943.—Annual Returns for Accounting Periods Beginning on or After January 1, 1943.—(a) Proof of exemption.*—An organization is not exempt from tax merely because it is not organized and operated for profit. In order to establish exemption it is necessary that every organization claiming exemption file with the collector for the district in which is located the principal place of business or principal office of the organization an affidavit or questionnaire as set forth below. An organization claiming exemption under section 101 (1), (3), (4), except a bona fide credit union, (6), (7), (8), (9), (10), (12), (14), or (16) shall file the form of affidavit or ques-

tionnaire appropriate to its activities, filled out in accordance with the instructions on the form or issued therewith. Copies of the following forms may be obtained from any collector: For organizations claiming exemption * * * under section 101 (9), Form 1025 * * *. To each such affidavit or questionnaire shall be attached a copy of the articles of incorporation, declaration of trust, or other instrument of similar import, setting forth the permitted powers or activities of the organization, the by-laws or other code of regulations, and the latest financial statement showing the assets, liabilities, receipts, and disbursements of the organization.

* * * * *

(b) * * *

In addition to the information specifically called for by these regulations the Commissioner may require any additional information deemed necessary for a proper determination of whether a particular organization is exempt under section 101, and when deemed advisable in the interest of an efficient administration of the internal revenue laws he may in the cases of particular types of organizations provide additional questionnaires or otherwise prescribe the form in which the proof of exemption shall be furnished.

* * * * *

(c) *Collector's duties with respect to proof of exemption.*—The collector, upon receipt of the affidavit or questionnaire and other papers constituting the proof of exemption by an organization claiming exemption from tax under section 101, will forward completed documents

to the Commissioner for decision as to whether the organization is exempt.

* * * * *

(e) *Requirement of annual returns.*—For accounting periods beginning after December 31, 1942, every organization exempt from tax under section 101, regardless of the amount or source of its income or receipts and irrespective of whether it is chartered by, or affiliated or associated with, any central, parent, or other organization, except organizations specifically exempted from filing annual returns by section 54 (f) (see subsection (h) of this section), shall file annually with the collector for the district in which is located the principal place of business or principal office of the organization a return of information on Form 990 (revised May, 1944) specifically stating the items of gross income, receipts, and disbursements and such other information as may be prescribed by the Commissioner in the instructions on the form or issued by him therewith. * * *

* * * * *

(g) *Date for filing annual returns.*—The annual return of information, Form 990 (revised May, 1944), for accounting periods beginning after December 31, 1942, but ending prior to April 1, 1944, shall be filed on or before August 15, 1944, and for accounting periods beginning after December 31, 1942, but ending after March 31, 1944, shall be filed on or before the 15th day of the fifth full calendar month following the close of the period for which the return is required to be filed.

* * * * *

(i) *Collector's records.*—Collectors will keep a list of all organizations held to be exempt from tax to the end that they may occasionally inquire into their status and ascertain whether or not they are (1) observing the conditions upon which their exemption is predicated, and (2) annually filing returns on Form 990 (revised May, 1944) if they are required to file such returns.

(j) *Records, statements, and other returns of tax-exempt organizations.*—An organization which has established its right to exemption from tax under section 101 and has also established that it is not required to file annually the return of information on Form 990 (revised May, 1944) shall immediately notify in writing the collector for the district in which is located its principal office of any changes in its character, operations, or purpose for which it was originally created.

Every organization which has established its right to exemption from tax, whether or not it is required to file an annual return of information, shall submit such additional information as may be required by the Commissioner for the purpose of enabling him to inquire further into its exempt status and to administer the provisions of section 54 (f) and this section. For requirement as to keeping of permanent books of account or records, see section 29.54–1.

An organization which has established its right to exemption from tax under section 101, including an organization which is relieved under section 54 (f) and these regulations from filing returns of income or annual returns of information, is not, however, relieved from the

duty of filing other returns of information (see sections 147 and 148).

Sec. 29.101 (9)–1. *Social Clubs.*—The exemption granted by section 101 (9) applies to practically all social and recreation clubs which are supported by membership fees, dues, and assessments. If a club engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes. Generally, an incidental sale of property will not deprive the club of the exemption.

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